

MEMORANDUM OF LAW

DATE: May 2, 1989

TO: Patricia Frazier, Financial Management
Director

FROM: City Attorney

SUBJECT: Utility Users' Tax

In a memorandum dated March 30, 1989, you asked this office whether it is legally permissible for the City to impose a utility users' tax on commercial and industrial users of telephone, gas, electric and cable television services. Additionally, in a telephone conversation on April 25, 1989, you asked if the County of San Diego could legally impose a similar tax on residents of the City of San Diego. You also asked if such a tax would be tax deductible.

The propriety of imposing a utility users' tax has previously been addressed by this office in Opinion No. 74-14, dated October 24, 1974. A copy of that Opinion is attached for your review. Additionally, in a post Proposition XIII case the court found that a utility users' tax is not a "special tax" and is therefore not subject to a referendum pursuant to Cal. Const., Article XIII A, section 4, as long as the money obtained from the tax goes into the City's general fund and is not earmarked for specific uses. *Felton v. City of Delano*, 162 Cal. App. 3d 400, 406 (1984). It appears from this that the passage of Proposition XIII has not inhibited the ability of the City to impose utility users' taxes on consumers as long as proper procedures are followed. Additionally, San Diego, as a charter city, is "empowered to exercise full control over its municipal affairs, unaffected by general laws on the same subject matters and subject only to limitations found in the Constitution and the city charter." *Rivera v. City of Fresno*, 6 Cal. 3d 132, 135 (1971).

No prohibitions against a utility users' tax are found in either the California Constitution or the City Charter. Therefore, since the California Constitution provides for local entities to raise revenue for general purposes, such a tax is legally permissible.

You should be advised, however, that Assembly Bill 1795, now pending before the state legislature, would, if passed, pre-empt the field of utility users' taxes for telephone service. A copy of the bill has been provided for your review. Pursuant to this

statute, no municipality would be permitted to impose additional users' taxes on telephone services.

In response to your question concerning the county's ability to impose a utility users' tax on residents of incorporated cities within county boundaries, the county has no authority to bind residents of incorporated areas by its actions. The courts have long ago said that:

When a municipality is organized within the boundaries of a county the territory embraced within the limits of such municipal corporation is withdrawn from the legislative control of the county as to all the subjects which the charter of such municipality declares shall be cognizable by the governing board or other authorities of such municipal corporation.

In *In re Knight*, 55 Cal. App. 511, 517 (1921), the court went on to explain:

A municipality is a distinct governmental entity, entirely independent of the county as such, and is, consequently, subject to no local legislation which it is within the power of the governing board of the county to enact. The county, in brief, has no legal right to legislate for a municipality located within its limits upon any subject which is within the scope of the powers granted to the municipality

In discussing a municipality's right to raise revenue the courts have said:

It is a long standing principle that the power to raise revenue for local purposes is not only appropriate but, indeed, absolutely vital for a municipality. *United States v. New Orleans*, 98 U.S. 381, 393, 25 L. Ed 225, 226. Moreover, the power to tax for local purposes clearly is one of the privileges accorded chartered cities by the home rule provision of

the California Constitution (Cal. Const., art. XI, section 5, subd. (a); *West Coast Adver. Co. v. San Francisco*, 14 Cal. 2d 516, 524, 526 (1939). *Weekes v. City of Oakland*, 21 Cal. 3d 386, 392 (1978).

California Constitution Article XI section 5(a) (the home

rule provision) grants to charter cities the right to make and enforce all ordinances and regulations with respect to municipal affairs, subject only to limitations found in the charter and to general laws.

Since taxation to raise revenue has been determined to be a strictly municipal affair the county has no legal authority to usurp the City's right to perform this function.

Finally, 26 U.S.C. 164 lists the taxes which are deductible from one's income tax. Utility users' taxes are not included in the list of deductible taxes. Additionally, Internal Revenue Service Publication 17 (Rev. Nov. 88) says specifically in Chapter 24, page 127 that state and local utility users' taxes are not deductible.

JOHN W. WITT, City Attorney

By

Sharon A. Marshall

Deputy City Attorney

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Attachments

ML-89-44